

No. 12709

IN THE  
**UNITED STATES CIRCUIT COURT OF APPEALS**  
FOR THE NINTH CIRCUIT

JAMES NELS EKBERG,

*Appellant,*

v.

RICHARD A. McGEE, ET AL.,

*Appellees.*

On Appeal From the United States District Court for the  
Northern District of California, Northern Division

**APPELLEES' PETITION FOR A REHEARING**

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**APPELLEES' PETITION FOR A REHEARING**

---

*To the Honorable Chief Judge and Circuit Judges:*

The appellees herein respectfully petition this court for a rehearing *en banc* in the above-entitled matter on the following grounds:

(1) The decision of this court is in conflict with other decisions of this court, namely, *Huffman v. Smith* (9 Cir.), 172 Fed. 2d 129; *Bird v. Smith* (9 Cir.), 175 Fed. 2d 260 (cert. den. 336 U. S. 954, 93 L. Ed. 1109, 69 S. Ct. 876); *Tate v. Heinze* (9 Cir.), 187 Fed. 2d 98 (cert. den. Misc. 409, Oct. Term, 1950), on the same points of law;

(2) The decision of this court is in conflict with decisions rendered by other circuit courts of the

United States, namely, *Goodwin v. Smyth* (4 Cir.), 181 Fed. 2d 498 (cert. den. 337 U. S. 946, 93 L. Ed. 1748, 69 S. Ct. 1503); *Weber v. Ragen* (7 Cir.), 176 Fed. 2d 579 (cert. den. 338 U. S. 809, 94 L. Ed. 489, 70 S. Ct. 49); *Schechtman v. Foster* (2 Cir.), 172 Fed. 2d 339 (cert. den. 339 U. S. 924, 94 L. Ed. 1346, 70 S. Ct. 613); *Coggins v. O'Brien* (1 Cir.), 188 Fed. 2d 130; and *Stonebreaker v. Smyth* (4 Cir.), 163 Fed. 2d 498, on the same points of law;

(3) The interpretation of Section 2254, Title 28 U. S. C., is not in accord with the decisions of *Darr v. Burford*, 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761, or *Ex parte Hawk*, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572.

Appellees seek this rehearing *en banc* in order that the various decisions of this court on the same points of law may be reconciled and the conflict of this decision with the decisions of other circuit courts may be resolved.

### QUESTION PRESENTED

The question presented by the decision of this court is: Must a federal district court entertain a petition for writ of habeas corpus by one confined under a final judgment of a state court where the petition shows that the petitioner has exhausted his state remedies, but where the petition on its face does not show a cause of action for federal relief? This court in this matter has answered the question affirmatively, contrary to its previous decisions and contrary to the decisions of other circuit courts.

## SUMMARY OF ARGUMENT

- I. The Decisions of the Ninth Circuit Court on the Question Presented Are in Conflict
- II. The Decision in This Matter Conflicts With the Decisions of Other Circuit Courts of Appeal on the Same Question of Law
- III. The Interpretation of Section 2254, Title 28 U. S. C., Is Not in Accord With the Principles Set Forth in the Cases of *Darr v. Burford*, 339 U. S. 200, or *Ex Parte Hawk*, 321 U. S. 114

## ARGUMENT

### I. The Decisions of the Ninth Circuit Court on the Question Presented Are in Conflict

The decision in the instant case is in direct conflict with this court's decision in the case of *Tate v. Heinze*, 187 Fed. 2d 98 (cert. den. 409 Misc., Oct. Term, 1950). In the *Tate* case, just as in the case at bar, the district court found that the petitioner had exhausted his state remedies and further found that there was nothing alleged in the petition which presented "exceptional circumstances of peculiar urgency" which entitled him to the issuance of the writ. This court in affirming the action taken by the United States District Court used the following language:

"Unquestionably, petitioner was justly convicted, and the sentence under the state Habitual Criminal Act was justified. In view of the fact that there is no merit in the present petition the petition to file *forma pauperis* should have been denied without hesitation. We only comment that

there was no ground for a certificate of probable cause for appeal. The only reason why such a certificate is justified is the abuse of this process, which has been engendered by some appellate rulings.”

In *Bird v. Smith*, 175 Fed. 2d 260 (cert. den. 336 U. S. 954, 93 L. Ed. 1109, 69 S. Ct. 876), this court held that the district court was not entitled to consider an application for habeas corpus based on the same grounds that had been presented to the state courts and the United States Supreme Court on certiorari where no exceptional circumstances were shown.

Again, in the case of *Huffman v. Smith*, 172 Fed. 2d 129, this court reached a similar decision, on the same points of law.

It is apparent that in the instant matter, where the petitioner had full opportunity to present the points raised in the petition to the state courts on his original appeal and again on his petition for habeas corpus in which certiorari was not granted by the United States Supreme Court, he has been accorded due process of law, and in the absence of exceptional circumstances of peculiar urgency which were not found to exist by the district court there was no abuse of its discretion. Under the decision, in the case at bar, this court would deprive a district court of the use of discretion in reviewing a petition for habeas corpus and compel a full hearing on the petition where the state remedies have been exhausted, even though no substantial federal question is presented. Since the

precise procedure approved by this court in *Tate v. Heinze*, 187 Fed. 2d 98, was adopted by the district court in the instant case and this court reached a contrary conclusion, it is apparent that these cases are in irreconcilable conflict and cannot serve as a guide for future action by the district court.

## **II. The Decision of This Court Is in Conflict With Decisions Rendered by Other Circuit Courts of the United States**

In the case of *Coggins v. O'Brien*, 188 Fed. 2d 130, decided by the United States Court of Appeals, First Circuit, the action of the United States District Court dismissing an application for habeas corpus and denying the writ was affirmed. In the cited case the petitioner had been tried and convicted in the state courts for second degree murder. He did not appeal his conviction, but made a motion for a new trial, which was denied. On appeal from the order denying the motion for a new trial, this order was affirmed by the State Supreme Court, and certiorari denied by the United States Supreme Court. Thereupon petitioner sought habeas corpus from the federal district court, which was denied, and this order affirmed on appeal. The court stated:

“While state courts have full discretionary power either to hear again or summarily to dispose of repeated applications for habeas corpus grounded on the same facts filed by prisoners in state custody, and federal courts have like powers with respect to prisoners in federal custody, different considerations apply in cases like the present. Due

respect for the delicacies of the relationship between the United States and its courts, and the states and theirs, under a federal system such as ours (see *Darr v. Burford*, 339 U. S. 200, 205, et seq., 70 S. Ct., 587, 94 L. Ed. 761, and cases cited) requires that the federal courts withhold their relief in state custody cases until it is made to appear that the state has not afforded a constitutionally adequate opportunity to prove the factual basis for a constitutional contention such as this unless 'exceptional circumstances of peculiar urgency are shown to exist.' *United States ex rel. Kennedy v. Tyler*, 269 U. S. 13, 17, 46 S. Ct. 1, 3, 70 L. Ed. 138; *Ex parte Hawk*, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572. In my view the area of judicial discretion in cases like the present is limited to the evaluation of the urgency of any exceptional circumstances which may be present in a particular case."

In the case of *Goodwin v. Smyth* (4 Cir.), 181 Fed. 2d 498 (cert. den. 337 U. S. 946, 69 S. Ct. 1503, 93 L. Ed. 1748), after the petitioner had exhausted his state remedies and applied for habeas corpus on the same ground in the United States District Court, the petition was denied and this denial was affirmed on appeal. The court in basing its decision on *Darr v. Burford*, 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761, stated:

"It is clear that the petition was properly denied. There was no allegation of any such unusual circumstances as would justify a lower federal court in granting a writ of habeas corpus to release a state prisoner, when that relief had

been denied by the highest court of the state and the Supreme Court had refused certiorari. As said by that court in *White v. Ragen*, 324 U. S. 760, 764, 65 S. Ct. 978, 981, 89 L. Ed. 1348: 'If this Court denies certiorari after a state court decision on the merits, or if it reviews the case on the merits, a federal District Court will not usually re-examine on habeas corpus the questions thus adjudicated. *Ex parte Hawk*, supra, 321 U. S. (114), 118, 64 S. Ct. (448), 450, 88 L. Ed. 572.'

"See also *Stonebreaker v. Smyth*, 4 Cir. 163 F. 2d 498; *House v. Mayo*, 324 U. S. 42, 65 S. Ct. 517, 89 L. Ed. 739; *Darr v. Burford*, 1950, 70 S. Ct. 587, 596. In the case last cited, the Supreme Court said: 'Even after this Court has declined to review a state judgment denying relief, other federal courts have power to act on a new application by the prisoner. On that application, the court may require a showing of the record and action on prior applications, and may decline to examine further into the merits because they have already been decided against the petitioner. Thus there is avoided abuse of the writ by repeated attempts to secure a hearing on frivolous grounds and repeated adjudications of the same issues by courts of coordinate powers.' "

In the case of *Adkins v. Smith* (4 Cir.), 188 F. 2d 452, in affirming an appeal from an order denying a writ of habeas corpus on the ground that the bill of indictment was fatally defective, the circuit court stated:

" 'We are confronted at the outset with the fact that the case presented by petitioner is precisely the same as that in which relief was denied by the

Virginia courts and in which certiorari was denied by the Supreme Court of the United States. The rights of petitioner were fully presented in that case and the Virginia courts had full power to grant the relief asked, had they thought petitioner entitled to it. The facts were fully before the Supreme Court of the United States on certiorari; and proper respect for that court compels the conclusion that if it had thought that the record showed a denial of petitioner's constitutional rights, certiorari would have been granted and petitioner would have been afforded relief. *While action of the Virginia courts and the denial of certiorari by the Supreme Court were not binding on the principle of res judicata, they were matters entitled to respectful consideration by the court below; and in the absence of some most unusual situation, they were sufficient reason for that court to deny a further writ of habeas corpus.* It would be intolerable that a federal district court should release a prisoner on habeas corpus after the state courts have refused him relief in precisely the same case on a similar writ and the United States Supreme Court has refused to review their action on certiorari. This would be, in effect, to permit a federal district court to review the Supreme Court of the United States as well as the highest court of the state. The rule in such cases was stated in the case of *White v. Ragen*, 324 U. S. 760, 764, 765, 65 S. Ct. 978, 981, 89 L. Ed. 1348, relied on by the court below, as follows:

“ ‘If this Court denies certiorari after a state court decision on the merits, or if it reviews the case on the merits, a federal District Court will

not usually re-examine on habeas corpus the questions thus adjudicated. *Ex parte Hawk*, supra, 321 U. S. (114) 118, (64 S. Ct. 448, 88 L. Ed. 572).'

“ ‘The citation of *Ex parte Hawk* shows what the court had in mind in the use of the words “will not usually re-examine” in the statement just quoted; for the court had pointed out in that case the sort of cases in which the district court would be justified in granting habeas corpus notwithstanding the denial of certiorari in cases where the state court had refused to grant relief. These were cases where resort to state court remedies had failed to afford a full and fair adjudication of the federal contentions raised either because the state afforded no remedy or because the remedy afforded proved in practice unavailable or seriously inadequate.’ ” (Emphasis supplied.)

In the case of *Schechtman v. Foster*, 172 Fed. 2d 339 (cert. den., 339 U. S. 924, 70 S. Ct. 613, 94 L. Ed. 1346), defendant appealed from an order of the federal district court dismissing his petition for a writ of habeas corpus after conviction of robbery in the state courts of New York. His petition was based on the ground that perjured testimony was used knowingly by the prosecution. His original conviction had been affirmed without opinion by the Appellate Division of the New York courts. Leave to appeal was denied. He had also sought petitions for habeas corpus, mandamus, certiorari, and coram nobis in the state courts, certiorari to the United States Supreme Court being denied on the last coram nobis proceeding. In affirming the denial of the writ of habeas corpus by

the federal district court, the Second Circuit Court stated:

“It must be remembered that upon habeas corpus a federal court does not in any sense review the decision in the state courts. Here, for example, the District Court could not properly have issued the writ, no matter how erroneous the judge had thought the state judges’ conclusion that the evidence did not make out a *prima facie* case of the deliberate use of perjured testimony. The writ was limited to the assertion of the relator’s rights under the Fourteenth Amendment; and due process of law does not mean infallible process of law. If the state courts have honestly applied the pertinent doctrines to the best of their ability, they have accorded to an accused his constitutional rights.”

Again, in *Weber v. Ragen* (7 Cir.), 176 Fed. 2d 579 (cert. den. 70 S. Ct. 49, 338 U. S. 809, 94 L. Ed. 489), the Seventh Circuit Court in affirming the denial of a writ of habeas corpus by the district court, stated:

“In the instant case certiorari from the Supreme Court of the United States to the Supreme Court of Illinois was sought and denied. The violations of all constitutional rights alleged here to have occurred were alleged on certiorari and urged to the Supreme Court of the United States. The Supreme Court was obviously not impressed with the petitioner’s assertion that he had been deprived by the courts of Illinois of his constitutional rights. We have been cited no case where the Supreme Court has denied certiorari, as in this case, and later decided that the United States District Court should take jurisdiction in a collateral proceeding

in habeas corpus to consider the identical questions that had been presented in the direct proceeding where certiorari was denied. \* \* \* There are no extraordinary circumstances in this case that would take it out of the rule just stated.” (176 Fed. 2d 579, 582) To the same effect, see, *Edmondson v. Wright* (2 Cir.), 177 Fed. 2d, 719 (cert. den. 338 U. S. 944, 94 L. Ed. 582, 70 S. Ct. 425); *Goodman v. Swenson* (4 Cir.), 173 Fed. 2d 349; and *Soulia v. O’Brien* (1 Cir.), 188 Fed. 2d 233.

It thus appears that the decision of this court in the case at bar raises a direct conflict with the decisions of the other circuit courts of the United States which recognize that “exceptional circumstances of peculiar urgency” and a substantial federal question must be presented to a federal district court by a petitioner who has exhausted his state remedies before the court must entertain the petition.

**III. The Interpretation of Section 2254, Title 28 U. S. Code, Is Not in Accord With the Principles Set Forth in the Cases of *Darr v. Burford*, 339 U. S. 200, or *Ex Parte Hawk*, 321 U. S. 114**

In its decision this court has interpreted Section 2254, Title 28 U. S. C., which reads, in part:

“An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances

*rendering such process ineffective to protect the rights of the prisoner.”* (Emphasis supplied.)

so that the italicised alternatives after the word “or” have no application where, as here, there is an effective state remedy of which the applicant has availed himself. This court relies on the statement in *Ex parte Hawk*, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572, that the writ is available in the federal courts only in “rare cases” presenting “exceptional circumstances of peculiar urgency,” as not being applicable to a case in which the petitioner has exhausted his state remedies and in which he makes a substantial showing of a denial of federal right.

In both *Ex parte Hawk*, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572, and *Darr v. Burford*, 339 U. S. 200, 70 S. Ct. 587, 94 L. Ed. 761, the United States Supreme Court did not state that after exhaustion of state remedies by a petitioner seeking a writ in the district court that the district court must entertain the writ. In *Darr v. Burford*, 339 U. S. 200, 214-5, Mr. Justice Reed stated:

“All the authorities agree that *res judicata* does apply to applications for habeas corpus. The courts must be kept open to guard against injustice through judicial error. Even after this Court has declined to review a state judgment denying relief, other federal courts have power to act on a new application by the prisoner. On that application, the court may require a showing of the record and action on prior applications and may decline to examine further into the merits because

they have already been decided against the petitioner. Thus there is avoided abuse of the writ by repeated attempts to secure a hearing on frivolous grounds, and repeated adjudications of the same issues by courts of coordinate powers.”

It would appear that under the majority opinion in the *Darr* case, that the federal district judge has the discretion to review the petition and dismiss it where on its face no substantial federal question is presented and no extraordinary circumstances of peculiar urgency are present. (*United States ex rel. Kennedy v. Tyler*, 269 U. S. 13, 17, 46 S. Ct. 1, 3, 70 L. Ed. 138.)

In the instant matter, the petitioner has failed to bear his burden of proof in showing on the face of his petition that the state court remedies did not afford him a full and fair adjudication of his rights or that the remedies afforded by California law proved in practice unavailable or seriously inadequate (*Ex parte Hawk*, 321 U. S. 114, 118, 64 S. Ct. 448, 88 L. Ed. 572).

In *Darr v. Burford*, 339 U. S. 200, 216, it is said:

“It is this Court which ordinarily should reverse state court judgments concerning local criminal administration.” \* \* \*

and on page 217, the court further states:

“It is this Court’s conviction that orderly federal procedure under our dual system of government demands that the state’s highest courts should ordinarily be subject to reversal only by this Court and that a state’s system for the administration

of justice should be condemned as constitutionally inadequate only by this Court.”

In interpreting this language contained in *Darr v. Burford*, supra, in *Coggins v. O'Brien*, 188 Fed. 2d 130, 134, Circuit Judge Woodbury stated:

“If the language quoted above is to be taken literally and given general application, then it would appear that even though a prior denial of certiorari to the highest state court is of no moment, it is not our function, *except in extraordinary cases*, to disagree with that court’s determination that the local system for the administration of justice squares with federal constitutional requirements. Hence, if it is not for us to disagree with the highest state court, it would seem that the function of the inferior federal courts in these cases would be only to expedite the applicant for habeas corpus along his secondary road through the federal courts to a second petition to the Supreme Court for certiorari to review the federal question which it has once declined to consider. And, on the other hand, if the denial of certiorari to the highest state court is to be given any weight at all by the inferior federal courts in cases like the present, it would seem to follow that we ought also to expedite the applicant on his way for, as pointed out by Judge Learned Hand in the *Schechtman* case, supra, 172 F. 2d 343, ‘unless we are altogether to disregard the action of the court of last resort in the very case itself, the denial ought to be conclusive.’ ” (Emphasis supplied.)

It does not appear that either the decision in the case of *Darr v. Burford*, 339 U. S. 200, nor *Ex parte*

*Hawk*, 321 U. S. 114, compel the conclusion that a federal district court must entertain and consider a petition for habeas corpus by one who has exhausted his state remedies absent extraordinary circumstances and a substantial federal question. In the instant case, Judge Lemmon found neither extraordinary circumstances nor a substantial question involved in his consideration of the petition presented by petitioner herein. This court in holding that Judge Lemmon abused his discretion in not further considering the petition ordered the district court “to give the application its further consideration,” but in no respect demonstrated that it considered that there was a substantial federal question involved or that in any way the petitioner had not been accorded his federal constitutional rights. The dissenting opinion of Circuit Judge Healy states:

“The petition for the writ presented no question of substance. Most of the points raised had been fully considered by the California court on appeal from the judgment of conviction, *People v. Ekberg*, 94 Cal. App. 2d 613, and their lack of merit exposed. In respect of points not urged on the direct appeal there is likewise no substantial showing of the denial of a federal right.”

In the case of *Ex parte Hawk*, 321 U. S. 114, the Supreme Court found that the doctrine of requiring extraordinary circumstances to be present was inapplicable “to one in which petitioner has exhausted state remedies *and in which he makes a substantial showing of a denial of a federal right.*”

This is not the situation in the case at bar, as recognized in the dissenting opinion of Judge Healy and as pointed out in the brief of appellees filed in this matter, (Brief for Appellees, pp. 11-19), for there has been no substantial showing of a denial of a federal right.

It would thus appear that this court has attempted to restrict the doctrines established in the *Darr* and *Hawk* cases and interpreted Section 2254 in such a way as to restrict the discretion hitherto vested in the Federal District Court in a manner not warranted by either the statute or the decisions of the United States Supreme Court.

### CONCLUSION

Appellees respectfully request that this court grant a rehearing *en banc* in order that this court may reconcile the opinion in the instant matter with that in *Tate v. Heinze*, 187 Fed. 2d 98, and the decisions of the other circuit courts of the United States which are in direct conflict; that the interpretation of Section 2254, Title 28 U. S. C., as adopted by this court in the case at bar eliminates the use of discretion by a federal district court in its consideration of applications for writs of habeas corpus by one confined under state process who has exhausted his state remedies, even though the face of the petition does not present a substantial federal question and therefore is not in accord with the principles enunciated

by the *United States Supreme Court* in *Darr v. Burford*, 339 U. S. 200, and *Ex parte Hawk*, 321 U. S. 114.

WHEREFORE, It is respectfully submitted that a petition for rehearing *en banc* should be granted.

Respectfully submitted,

EDMUND G. BROWN,  
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CLARENCE A. LINN,  
Assistant Attorney General  
of the State of California

DORIS H. MAIER,  
Deputy Attorney General of  
the State of California

*Attorneys for Appellees*

**Certification**

STATE OF CALIFORNIA    }  
County of Sacramento } ss.

DORIS H. MAIER, being first duly sworn, deposes and says: That she is one of the attorneys for the appellees in the above-entitled matter; that in her judgment the petition for rehearing *en banc* in said matter is well founded, and that it is not interposed for the purpose of delay.

(signed)

DORIS H. MAIER

Subscribed and sworn to before me  
this 26th day of September, 1951

(signed) ARTHUR A. OHNIMUS

Deputy Attorney General of the  
State of California